Supreme Court, U. S.
FILED
FEB 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1156

MARIANNE O'BRIEN REYNOLDS,
Petitioner

versus

ESTATE OF RICHARD J. REYNOLDS,
deceased, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

WILLIAM L. O'CALLAGHAN, JR.
Suite 360, Prado North
5600 Roswell Road
Atlanta, Georgia 30342

C. HARRIS DITTMAR
1500 Barnett Bank Building
112 West Adams Street
Jacksonville, Florida 32202
Attorneys for Petitioner

Of Counsel:
JOHN D. SAUNDERS
RICHARD L. STUMM
GENE B. McCLURE
O'Callaghan, Saunders & Stumm
Suite 360, Prado North
5600 Roswell Road
Atlanta, Georgia 30342

JOHN F. CALLENDER
Bedell, Bedell, Dittmar & Zehmer
1500 Barnett Bank Building
112 West Adams Street
Jacksonville, Florida 32202

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	26
CERTIFICATE OF SERVICE	26
INDEX OF APPENDICES	1a

TABLE OF AUTHORITIES

Cases:

Atlantic Coast Line R.R. v. Phillips, 332 U.S. 168 (1947)	15
Bell v. Burson, 402 U.S. 535 (1971)	23
Bennett v. Bennett, 157 Ga. 848, 122 S.E. 616 (1924)	22, 25
Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973)	9
Bowman v. Loperena, 311 U.S. 262 (1940)	8
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930)	9, 11
Carrington v. Rash, 380 U.S. 89 (1965)	23
Chicago, Burlington and Quincy R.R. v. Chicago, 166 U.S. 226 (1897)	10

	Page
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	22, 23
County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57, *cert. denied* 419 U.S. 872 (1974)	9
Cuyahoga River Power Co. v. City of Akron, 240 U.S. 462 (1916)	10
Delmar Jockey Club v. Missouri, 210 U.S. 324 (1908)	15
Eisenstadt v. Baird, 405 U.S. 438 (1972)	18, 19
First National Bank of Chicago v. United Airlines, 342 U.S. 396 (1952)	24
Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968)	18, 20
Gomez v. Perez, 409 U.S. 535 (1973)	18
Guffin v. Kelly, 191 Ga. 880, 14 S.E.2d 50 (1941)	25
Hughes v. Fetter, 341 U.S. 609 (1951)	24, 26
Hughes v. Washington, 389 U.S. 290 (1967)	9, 10, 13
In Re Estate of Fleischmann, 64 Misc.2d 924, 316 N.Y.S.2d 272 (1970)	25
John Hancock Mutual Life Insurance Company v. Yates, 299 U.S. 178 (1936)	24
Levy v. Louisiana, 391 U.S. 68 (1968)	18, 20
Marvin v. Marvin, L.A. 30520 (Cal. Sup. Ct. Dec. 27, 1976)	18
McCoy v. Union Elevated R.R., 247 U.S. 354 (1918)	14

	Page
McGee v. International Life Ins. Co., 355 U.S. 220 (1957)	21
Melton v. Hubbard, 135 Ga. 128, 68 S.E. 1101 (1910)	25
Morse v. United States, 270 U.S. 151 (1926)	8
New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973)	18
Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co., 45 U.S.L.W. 4105 (Jan. 12, 1977)	9
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	13
Roberts v. New York, 295 U.S. 264 (1935)	15
Saunders v. Shaw, 244 U.S. 317 (1917)	8, 11
Shelly v. Kraemer, 334 U.S. 1 (1948)	11
Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Haw. 1975)	10
Stanley v. Illinois, 405 U.S. 645 (1972)	9, 18, 20, 22, 23
Sumner v. Sumner, 121 Ga. 1, 48 S.E. 727 (1904)	25
United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)	18, 20
United States Department of Agriculture v. Murry, 413 U.S. 508 (1973)	23
Vlandis v. Kline, 412 U.S. 441 (1973)	22, 23
Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)	18, 20

Page

Wells v. Simonds Abrasive Co.,
345 U.S. 514 (1953) 24

West v. Chesapeake & Potomac Telephone Co.,
295 U.S. 662 (1935) 10

Constitution and Statutes:

CONSTITUTION OF THE UNITED STATES:

Article IV, Section 1 4

Amendment V 4

Amendment XIV, Section 1 4

UNITED STATES STATUTES:

15 U.S.C. § 1691 *et seq.*
[Equal Credit Opportunity Act] 18

28 U.S.C. § 1257(3) 2

GEORGIA STATUTES:

[Former] Ga. Code Ann § 1901 *et seq.* (Ga. Laws 1939, pp. 384-85, repealed and superceded, Ga. Laws 1962, p. 162 *et seq.*) 4, 12, 15

Ga. Code Ann. §109A-8-301
(Ga. Laws 1962, pp. 156, 364) 4

Miscellaneous:

Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 Cal.L.Rev. 1169 (1974) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

MARIANNE O'BRIEN REYNOLDS,
Petitioner

versus

ESTATE OF RICHARD J. REYNOLDS,
deceased, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner, Marianne O'Brien Reynolds, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case on November 3, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia, affirming the grant of respondents' motions for summary judgment in the McIntosh County Superior Court, is reported at 238 Ga. 1 (1977) (Southeastern citation not available). Appendix, pp. 3a-9a. The Order entered November 23, 1976, denying petitioner's motion for rehearing is at Appendix, p. 2a. The Order of the McIntosh County Superior Court granting the motions for summary judgment of respondents Sapelo Island Research Foundation, Inc.; Luhr G. C. Beckmann, Jr.; Alfred W. Jones, Sr.; James Wright; Ed R. Gray, Jr.; and Ledyard S. Staples, is at Appendix, pp. 15a-25a. The Order of the McIntosh County Superior Court granting the motion for summary judgment of respondent State of Georgia is at Appendix, pp. 13a-14a. The Order of the Superior Court of McIntosh County granting the motions for summary judgment of respondents Nancy S. Reynolds and Herrick K. Lidstone is at Appendix, pp. 9a-13a.

JURISDICTION

The opinion and judgment of the Supreme Court of Georgia in this case were entered on November 3, 1976. The Supreme Court of Georgia subsequently issued an Order on November 23, 1976, denying petitioner's timely motion for rehearing, without opinion, and this petition is filed within ninety days of that date. Accordingly, this Court has jurisdiction to review the judgment in question by writ of certiorari under Title 28 of the United States Code, §1257(3).

QUESTIONS PRESENTED

I. Whether the decision by the Supreme Court of Georgia effected so unpredictable a change in state law

in favor of the State of Georgia as to deny due process and take petitioner's property for public purposes without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

II. Whether the ruling of the Supreme Court of Georgia that a transfer on the corporate records of Sapeloe Plantation, Inc. was necessary to give the petitioner ownership rights in the stock certificates in question and the trust corpus substituted therefor, as against these respondents, constitutes such obvious error or arbitrary action that petitioner was deprived of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

III. Whether the ruling by the Supreme Court of Georgia that the instrument between the petitioner and R. J. Reynolds, was invalid due to the marital status of the parties as a violation of "public policy" denies the petitioner equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

IV. Whether the ruling by the Supreme Court of Georgia that the instrument in question was invalid due to the marital status of the parties as a violation of "public policy" creates an irrebuttable presumption violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

V. Whether the full faith and credit provision of Article Four of the Constitution of the United States required the Supreme Court of Georgia to give effect

to the laws of the State of New York concerning the validity and enforceability of the 1945 agreement between petitioner and R. J. Reynolds, Jr.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Article IV, Section 1

> Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.

Amendment V

> No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .
>
> . . . nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Statutes:

Ga. Laws 1939, pp. 384-85, (former *Ga. Code Ann.* § 22-1902), which is set out in Appendix VII, repealed and superceded, Ga. Laws 1962, p. 162, *et seq.*

Ga. Laws 1962, pp. 156, 364 (*Ga. Code Ann.* §109A-8-301), which is set out in Appendix VII.

STATEMENT OF THE CASE

On December 31, 1975, Marianne O'Brien Reynolds, petitioner, filed suit in the Superior Court of McIntosh

County, Georgia, against respondents, including the State of Georgia; the Sapelo Island Research Foundation, Inc. and its Trustees; other corporate entities; the Estate of Richard J. Reynolds, deceased; Annemarie S. Reynolds, individually and as executrix of the Estate; and other persons, to halt the transfer by respondent Sapelo Island Research Foundation to the State of Georgia of a substantial portion of Sapelo Island off the Georgia coast; to set aside previous transfers of portions of that Island by various respondents and corporate entities controlled by them; and to have possession of the entire Island and her ownership thereof affirmed; or, alternatively, to receive damages from respondents, an accounting and other ancillary relief to remedy an original and continuing fraud and violations of her ownership rights. Petitioner's interest in the Island is evidenced by the following instrument executed and delivered by R. J. Reynolds.

> Received of Marianne Margaret Grace O'Brien the sum of $10.00 ten dollars and other valuable consideration as payment in full for the common stock of Sapeloe Plantation, Inc., said stock to be delivered by sunset Saturday Oct. 20th 1945.
>
> Richard J. Reynolds

This instrument conveyed title to all the ownership in the corporation which owned the Georgia island. The common stock so conveyed was represented by R. J. Reynolds to have been endorsed over to petitioner and held by him for her in a safe deposit box as a delivery of the certificates; and her ownership of the securities and the Island was confirmed by R. J. Reynolds' attorney. At the time of such transfer of common stock to petitioner, Reynolds was married but seeking a divorce; petitioner was unmarried. Reynolds and petitioner later

married. Numerous fraudulent and ineffective conveyances of the securities and the Island by R. J. Reynolds and his co-conspirators (the respondents) and subsequent acquisition by respondent State of Georgia, with notice of petitioner's interest, all in violation of the constructive trust arising from the fraud and breach of legal duties to her, were alleged in petitioner's multi-count complaint. Respondents moved for summary judgment, and affidavits, deposition testimony, and numerous instruments, were offered by both sides. The trial court granted such motions, and petitioner Marianne O'Brien Reynolds appealed to the Supreme Court of Georgia.

On November 3, 1976, the Georgia Supreme Court affirmed, holding that any agreement between petitioner and R. J. Reynolds, which was made at a time when R. J. Reynolds was married to another person, created no rights in petitioner since such an agreement would be against public policy; and, since the common stock conveyed by the instrument was never transferred on the stock books of the corporation, there were no rights, legal or equitable, created in petitioner. Accordingly, it held that respondent State of Georgia could become the bona fide purchaser of Sapelo Island regardless of its notice or knowledge of petitioner's interest and without compensation to her.

In holding that a transfer on the stock books of the corporation was required to create rights in the petitioner, the Georgia Supreme Court construed statutory provisions in Georgia in an unforeseeable way and in direct opposition to the plain terms of the statute and any relevant precedent. Moreover, the Supreme Court of Georgia enunciated a public policy of the State of Georgia which benefited the State itself in the transac-

tion under review. The public policy prohibits property arrangements between married persons and unmarried persons, a distinction which is constitutionally impermissible. The results of this decision are to take petitioner's property without compensation and due process of law, and to deprive her of equal protection of the law in violation of the Constitution and relevant decisions of this Court.

Marianne O'Brien Reynolds, on November 12, 1976, filed a Motion for Rehearing (Appendix, pp. 26a-36a) asserting the aforesaid errors, which motion was denied without opinion on November 23, 1976. (Appendix, p. 2a).

The federal questions presented in this petition were not raised in the trial court or in the Supreme Court of Georgia and were not passed on by either Court. They were not raised because the petitioner had every reason to assume that the Supreme Court of Georgia would follow the statutory law of the State of Georgia. Petitioner correctly perceived that the decision announcing and applying a judicial statement of public policy resulted from the Georgia Court's overlooking evidence of controlling fact and the existence of a controlling statute which made the announced public policy inapplicable; and the petitioner assumed that the Supreme Court of Georgia would withdraw and correct its decision when its oversights were brought to its attention by petitioner's motion for rehearing.

Only when the Supreme Court of Georgia denied petitioner's motion for rehearing, thereby allowing respondent State of Georgia to retain petitioner's property which had come into its possession through the combined fraudulent acts of the other respondents and R. J. Reynolds, and to take remaining portions of the property

without compensation was it apparent that petitioner was indeed to be denied the equal protection of the laws and to be deprived of her property without due process through state action in the form of a judicial statement of public policy overriding the statutory law. At this point there was no opportunity for petitioner to raise the federal constitutional questions presented herein and have them passed upon by the Supreme Court of Georgia in time to file a timely petition for writ of certiorari in this Court. *Saunders v. Shaw,* 244 U.S. 317 (1917). The procedural law of the State of Georgia permits only one motion for rehearing of right and the attempt to file an additional motion for rehearing raising the federal questions presented herein, would not have stayed the mandate of the State Supreme Court and would not have tolled the time for filing a petition for writ of certiorari in this Court. *Bowman v. Loperena,* 311 U.S. 262 (1940); *Morse v. United States,* 270 U.S. 151 (1926).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Court should review the decision of the Supreme Court of Georgia because that Court has rendered a decision which violates principles of the Constitution and applicable decisions of this Court. The effect of such decision raises important questions of federal law which have not been, but should be, settled by this Court.

This petition presents the opportunity to this Court to review the assertion by a State Court of "public policy" regarding marital status. Significant decisions of this Court for a number of years have demonstrated the unconstitutional discrimination and unequal treatment of persons by states in respect of sex and marital status;

e.g. Stanley v. Illinois, 405 U.S. 645 (1972). The Supreme Court of Georgia has acted to effect a "public policy" beyond the permissible constitutional dimensions. The result of such policy in this case is to enrich the respondent State itself. Not only should the correct constitutional limits of such action by states be reviewed and clarified by this Court, but also the arbitrary and unjust application of such erroneous policy to the petitioner and her property rights must be remedied.

This Court has, in recent years, been concerned with attempts by states to claim privately owned property without exercising the right of eminent domain and without compensating the owners of such land. *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), *overruled on other grounds, Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 45 U. S. L.W. 4105 (Jan. 12, 1977); *Hughes v.Washington,* 389 U.S. 290 (1967). Where the taking is attempted by an exercise of the state's legislative power, the transgression of constitutional rights is obvious. However, where the same result is achieved through judicial decision setting forth a new rule of law or resting on a "public policy" which benefits the State itself, the violation is more subtle, although a violation nonetheless. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930). Such a violation is, in fact, more egregious than legislative transgression, and this Court is the only forum in which such a violation can be rectified. As the limits to which state courts may go in effecting an unconstitutional taking without fear of interference in their decisions have not been clearly defined, the way is left open for confusion as to the extent to which state court decisions will be allowed to affect vested private rights. *See, e.g., County of Hawaii v. Sotomura,* 55 Haw. 176, 517 P.2d 57 (1973), *cert. de-*

nied, 419 U.S. 872 (1974); *Sotomura v. County of Hawaii,* 402 F.Supp. 95 (D. Haw. 1975).

In the *Hughes* case, *supra,* at 296-297, Justice Stewart warned that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." Yet this is precisely what the Supreme Court of Georgia has done. It is essential to the protection of private property rights that this Court review such actions by state courts. The states must not be allowed to engage in property transactions even for admirable public goals at the expense of the private property owner in contravention of constitutionally protected rights and, particularly, in actions where the State itself succeeds to the benefits obtained by fraudfeasors.

I.

The Decision of the Supreme Court of Georgia, Effecting an Unpredictable Change in State Law, Which Change Favored the State of Georgia, Constituted a Taking of Plaintiff's Property For Public Purposes Without Compensation, in Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

While acknowledging the inherent authority of every state to appropriate the property of its citizens for public necessities, this Court has consistently ruled that the Fifth and Fourteenth Amendments require the states to make just and adequate compensation to their citizens in exercising this power. *West v. Chesapeake & Potomac Telephone Co.,* 295 U.S. 662 (1935); *Cuyahoga River Power Co. v. City of Akron,* 240 U.S. 462 (1916); *Chicago*

Burlington and Quincy R.R. v. Chicago, 166 U.S. 226 (1897). By its decision in this case, the Georgia Court has divested petitioner of her ownership interest in Sapelo Island through a ruling which can be characterized only as arbitrary. This decision effectively legitimated a previous transaction by the State of Georgia, which petitioner alleged to be with notice of her rights but without compensation, for a major portion of Sapelo Island, and cleared the way for the acquisition of an additional portion of the Island by the State, also in derrogation of petitioner's rights. In view of the prior decisions of this Court, there can be no question that the action of the Georgia Court was "state action," constituting a taking of petitioner's property for public use without compensation, and is fully reviewable here. *Shelly v. Kraemer,* 334 U.S. 1 (1948); *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673 (1930); *Saunders v. Shaw,* 244 U.S. 317 (1917).

The decision of the Georgia Court constitutes a taking of petitioner's property precisely because of the unforeseeable, unpredictable and retroactive change made by that Court in the state law governing transfer of ownership interests in securities. Inasmuch as petitioner's cause of action is based upon respondents' and their predecessors' fraudulent acts and breach of legal and equitable duties to her arising from her ownership of the securities and the land substituted therefor by conveyance, the question of ownership of these certificates assumes critical importance. The pertinent statutory provision in effect in Georgia at the time petitioner acquired ownership rights provided:

> Title to a certificate and to the shares represented thereby can be transferred only (a) By delivery of the certificate endorsed either in

> blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby. . . .

Ga. Laws 1939, p. 384 *et seq.* (former *Ga. Code Ann.* §1902). Petitioner's research discloses no cases which give this statute any construction other than its plain and literal meaning; *i.e.*, that delivery of the certificates, properly endorsed, vests ownership rights in the transferee. Because the evidence of record showed clearly that R. J. Reynolds did transfer the certificates in question to petitioner, the only logical conclusion on this question is that petitioner had acquired all the ownership rights in the corporation. However, the Georgia Court completely rejected this clear and unambiguous statutory language, inventing a rule that a transfer on the corporate records is necessary to transfer ownership interests in the securities.

The impact of this innovation requires review in light of the State's interest in the premises. The State of Georgia had previously acquired over 13,000 acres of Sapelo Island for less than $65 per acre and "the making of a gift" from R. J. Reynolds' successor, at a time when petitioner alleged that the State had notice of her ownership interest. Moreover, the State of Georgia recently acquired additional portions of Sapelo Island from the respondent Foundation. In such circumstances, due process of law requires the highest degree of impartiality and dispassionate assessment of the conflicting claims in order that the power of the State not overwhelm that of its citizens. Yet the decision given by the Georgia Court reflects no such impartiality; rather, it shows a complete disregard for the plain rights given petitioner under statute, with the result that the State of Georgia acquired record title to Sapelo Island without compensa-

tion for petitioner's interest and with compensation only to those alleged to be the fraudfeasors who conspired in the taking.

Although the Georgia Court did not characterize the State's action as a taking, and the State argued it was a bona fide "purchaser," it remains a taking nonetheless. As Mr. Justice Stewart stated in his concurring opinion in *Hughes v. Washington*, 389 U.S. 290 (1967):

> As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same by effecting a retroactive transformation of private into public property — without paying for the privilege of doing so.

389 U.S. at 297-298. For these reasons, the actions of the Georgia Court constituted a taking of petitioner's property without compensation in violation of the Fifth and Fourteenth Amendments. *Hughes v. Washington, supra; Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

II.

The Ruling By the Supreme Court of Georgia That a Transfer on the Corporate Records Was Necessary to Give Petitioner Ownership of the Stock in Question Was an Arbitrary Action Depriving Petitioner of Her Property Without Due Process of Law in Violation of the Fourteenth Amendment.

Although ownership rights in property are normally a matter of state law and beyond the scope of review of this Court, it is a fundamental principle of the federal law that this Court may inquire into state court proceedings to determine whether the rule of law adopted in the state proceedings operated to deprive a citizen of his or her property without due process of law, contrary to the Fifth and Fourteenth Amendments. *McCoy v. Union Elevated R.R.*, 247 U.S. 354 (1918). In this case petitioner urges that the rulings by the Supreme Court of Georgia respecting her ownership rights to certain shares of stock have been made with an absolute disregard to prior statutory and decisional law on this question, and that the result of these rulings have been to divest petitioner of her ownership rights in these shares as against the respondents. Arbitrary and unpredictable actions such as these by the State's highest court are manifestly in violation of due process under the Fourteenth Amendment.

In its opinion affirming respondent's summary judgment, the Supreme Court of Georgia placed controlling significance upon the fact that the corporate records of Sapeloe Plantation, Inc. did not show the transfer of stock certificates from R. J. Reynolds to petitioner. On this basis, and that of public policy expressed below, the Court held *as a matter of law* that the agreement between petitioner and Reynolds was still executory; *i.e.*, that petitioner had received no ownership rights in the stock. This ruling by the Georgia Court was at the cornerstone of its decision.

As petitioner strongly urged upon the Georgia Court in her motion for rehearing, the Court's ruling on the question of when ownership rights vest in a transfer of securities is completely contrary to the statute ap-

plicable at the time the agreement was made and performed. Petitioner carefully called the Georgia Court's attention to Section One of the Uniform Stock Transfer Act which was undisputedly in effect in Georgia at all times pertinent to this case. Ga. Laws 1939, p. 384 *et seq.*, (former *Ga. Code Ann.* § 22-1902). Appendix, p. 38a. Under Section One of that Act, ownership of corporate shares could be transferred by delivery of the endorsed certificates; that is, there was no requirement that corporate stocks be transferred on the corporate records. The fact of controlling importance is the delivery by R. J. Reynolds to petitioner of the stock certificates representing ownership of Sapeloe Plantation, Inc. Delivery of the endorsed certificates themselves is the critical factor in determining ownership rights. Petitioner's research discloses no judicial suggestion that the statute be given anything other than its plain meaning. Therefore, the ruling by the Georgia Court on this question was unwarranted and arbitrary, having a basis neither in precedent nor policy, and the effect has been to deprive petitioner of ownership rights guaranteed specifically by an unambiguous statute without due process of law.

Where the decision of a state's highest court is plainly arbitrary or manifestly wrong, or where such decision ignores "plain rights," this Court has consistently held that the party aggrieved by the decision may seek relief under a claim that the decision constitutes a taking of property without due process of law. *Atlantic Coast Line R.R. v. Phillips*, 332 U.S. 168 (1947); *Roberts v. New York*, 295 U.S. 264 (1935); *Delmar Jockey Club v. Missouri*, 210 U.S. 324 (1908). As petitioner has shown, the ruling by the Georgia Court with respect to vesting of her ownership rights in the securities clearly disregards the plain and unequivocal language of the pertinent statute.

In addition, the ruling of the Georgia Court is arbitrary and unrealistic in light of the operation of the securities markets pursuant to federal and state regulation of the industry. Ownership transfers in securities are effected merely by endorsement and delivery of the certificates themselves; and such transfers are *not* conditioned upon proper notation in the corporate records. The effect of the Georgia Court's ruling is that such usual stock transfers are not effective transfers of ownership until registered on the corporate records.

If the securities markets operating with respect to Georgia citizens were required to modify their practices to conform to the rule applied to petitioner in this case, that change would be such a burden on the interstate commerce in securities as to be patently unconstitutional. The Georgia Court refused to consider the arbitrary and unrealistic effect of its novel ruling in denying petitioner's motion. In light of the foregoing reasons, the decision by the Supreme Court of Georgia has denied her the due process of law guaranteed by the Fourteenth Amendment.

III.

The Ruling of the Supreme Court of Georgia That the 1945 Instrument Between the Petitioner and R. J. Reynolds, Jr. Was Unenforceable Because One of the Parties Was a Married Person Denies the Petitioner Equal Protection of the Laws.

In announcing a public policy, making access to state courts to enforce contract or other rights depend upon marital status, the Georgia Supreme Court has erected a discriminatory barrier in violation of petitioner's equal

protection rights. It has long been recognized that the essence of unconstitutional discrimination is the unequal treatment of persons similarly situated. While a state is not required to treat all persons equally, where it does classify, its classifications must be for a legitimate state purpose and the classifications must be reasonably calculated to effectuate the legitimate state purpose.

The decision below judicially enacts a rule of public policy denying access to the state courts on the basis of classifications by marital status.

The "legislative purpose" of the present judicial enactment is stated to be furthering the " . . . public policy of Georgia which favors the preservation of marriage." (Appendix, p. 5a.)

The evidence is undisputed that R. J. Reynolds was still married to his first wife in October, 1945 when he drew and executed the instrument transferring the stock of Sapeloe Plantation, Inc. to petitioner for the sum of ten dollars and other valuable consideration. The evidence of record also established that R. J. Reynolds and his first wife had been separated prior to October, 1945 and that they continued to live separate lives with their marriage irretrievably broken until that marriage was dissolved by final divorce on June 14, 1946.

Thus, in declaring the public policy depriving petitioner of the benefits of the arrangement which she entered into with R. J. Reynolds and which she fully performed, the Supreme Court of Georgia must have found that the State of Georgia had an interest in preserving a marriage which no longer had substance or vitality but existed in form only.

This public policy is constitutionally impermissible. The decisions of this Court establish that an individual's rights may not be made to depend on family relationships. *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973). Neither may they be made to depend upon marital status; *Stanley v. Illinois,* 405 U.S. 645 (1972); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); nor on the marital status of one's parents; *Levy v. Louisiana,* 391 U.S. 68 (1968); *Glona v. American Gurantee & Liability Ins. Co.,* 391 U.S. 73 (1968); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *Gomez v. Perez,* 409 U.S. 535 (1973); *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973).

In view of social trends deemphasizing the institution of marriage by dramatically increased divorce rates and numbers of unwed couples living together [Bureau of the Census report (February 8, 1977)]; and in view of pronouncements by the Congress of the United States in enacting the Equal Credit Opportunity Act (15 U.S.C. § §1691 *et seq.*), making it "unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction" [§1691a]; the Georgia decision is in serious conflict with national expressions of policy. It is also directly conflicting with the emerging judicial expressions of policy elsewhere in the country. *See, e.g., Marvin v. Marvin,* L.A. 30520 (Cal. Sup. Ct. 27, 1976); Weitzman, *Legal Regulation of Marriage: Tradition and Change,* 62 Cal. L. Rev. 1169 (1974).

Even if the public policy in favor of the preservation of marriage should be permissible, the means adopted by the present decision are so ill-calculated to promote the policy as to constitute invidious discrimination on

the basis of marital status. By making access to the State Courts depend upon the marital status of the contracting parties, the Georgia Supreme Court would force contracting parties to act at their peril in determining the marital status of their promisors and the effect of such status on the enforceability of their bargains.

Denying access to courts to married persons and their privies cannot rationally be said to promote preservation of marriage. The effect of the new rule upon the preservation of marriage could be at most incidental, while the direct effect of such a classification is to deny rights to an arbitrarily selected segment of the population.

The time is certainly ripe for this Court to determine that states cannot, consistent with the Fourteenth Amendment, deny any of the incidents of citizenship to a person on grounds of marital status.

The Supreme Court of Georgia, by suddenly announcing in the instant case that the availability of the courts of that state to enforce contract rights has been withdrawn as to petitioner today and as to those similarly situated in the future on the basis of the marital status of the contracting parties, violated petitioner's constitutional rights to due process and equal protection in direct conflict with the principles of recent Supreme Court cases.

In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the statute purportedly advancing a Massachusetts public policy

> . . . to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and

> virtuous race of men and women. (405 U.S. 438, 449)

by discriminating between similarly situated married and unmarried individuals, was held to violate the equal protection clause of the Fourteenth Amendment.

In *Stanley v. Illinois*, 405 U.S. 645 (1972), it was held to be a denial of equal protection for a state to refuse to permit an unwed father to come into court to contest his children's wardship.

In the cases of *Levy v. Louisiana*, 391 U.S. 68 (1968) and *Glona v. American Guarantee and Liability Co.*, 391 U.S. 73 (1968), the Court held that it was a denial of equal protection for a state to make access to its courts in wrongful death actions depend upon the legitimacy of the plaintiffs or the decedents.

In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the Court held that a state's denial of equal recovery rights to illegitimate children under workman's compensation violated the equal protection clause.

In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court held that it was an impermissible denial of equal protection to withhold food stamps on the basis of the relationship, including marital status, of members of otherwise eligible households. In *Moreno* the United States, in the early stages of the suit, abandoned the argument that the legislative purpose had been to "foster morality" (*see* footnote 7, 413 U.S. 528, 536).

In the instant case the Supreme Court of Georgia, in the face of the clear implications of *Baird, Stanley, Levy, Glona* and *Moreno* that the exercise of constitutional rights cannot be made to depend on sex or marital status,

here announced a rule denying constitutional rights on the basis of a public policy very close to the one held insufficient to support the discrimination struck down by *Baird*.

While the effect of this discrimination in the instant litigation is to benefit the State of Georgia at the expense of petitioner by allowing the State to retain valuable property without compensating petitioner who is being denied access to the courts to prove her claim, a larger question of principle is involved. Other states may have, or may adopt, similar discriminatory policy; *cf., McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). In Georgia, the ability to come into court to seek enforcement of one's contractual rights will now be made to depend upon the status of the parties. Moreover, the status upon which such rights are now to be made to depend involves a classification which has failed constitutional muster in *Levy, Stanley, Baird* and *Moreno*. The subject is therefore important enough in its broad implications to warrant the consideration of this Court and require review by this Court to correct the unconstitutional and unjust action below.

IV.

The Ruling of the Supreme Court of Georgia That an Instrument is Unenforceable for the Reason that One of the Parties Thereto Was a Married Person Creates an Irrebuttable Presumption Violative of the Due Process Clause of the Fourteenth Amendment.

The Supreme Court of Georgia ruled as a matter of law that the instrument between petitioner and R. J. Reynolds, Jr. was unenforceable and ineffective to con-

vey any rights to petitioner (an unmarried woman) because Mr. Reynolds was at that time married to another woman.

The issue presented here is whether the Due Process Clause of the Fourteenth Amendment permits the Georgia Court to presume conclusively that the instrument violates the announced public policy simply because it may have involved a promise to marry made to a person already married. The Georgia Court has created a permanent irrebuttable presumption which operates to deny petitioner her rights under an otherwise valid agreement, when the enforcement of that agreement would not be violative of the announced public policy in this case. This Court has recognized such claims under the Due Process Clause many times previously, and the issue raised undoubtedly presents a question appropriate for review. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The rule of the Georgia Court sweeps too broadly here in its attempt to promote marital harmony. The Georgia cases state clearly that the goal to be achieved in this regard is "... the law's interest that every family circle shall, if possible, be unbroken...." *Bennett v. Bennett*, 157 Ga. 848, 122 S.E. 616 (1924). The rule makes unenforceable agreements which do not in fact erode a marriage existing at the time such agreements are made.

The evidence of record in this case shows conclusively that the marriage between Richard J. Reynolds and his first wife was irrevocably broken at the time Richard Reynolds and petitioner made their agreement. Richard and Elizabeth Reynolds had lived apart for some time prior to 1945, and it is clear from the evidence in respondents' documents that Richard and Elizabeth Reyn-

olds had decided to dissolve their marriage long before he made the conveyance to petitioner. In such circumstances it cannot possibly be presumed conclusively that the 1945 instrument between petitioner and Richard Reynolds had an adverse affect on an existing marriage. That union was already dissolved in fact. Petitioner has argued this position at every opportunity in this case; however, the irrebuttable presumption created by the Georgia Court in this case to apply to petitioner, precluded any proper consideration of the question. Under the rule announced and applied by the Georgia Court in this case, petitioner's rights are unenforceable, not because the agreement tended to dissolve an existing marriage, but simply because Richard Reynolds was married at the time he made the agreement. This rule falls woefully short of due process of law.

Irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments. *Vlandis v. Kline, supra.* This case presents to the Court a classic type of presumption; *viz.*, that all contracts involving a promise to marry made to a person already married adversely affect marital harmony. The Constitutional issue arises here precisely because this presumption is not necessarily or universally true in fact, as the present case illustrates. This Court has traditionally struck down such presumptions and required factual inquiry under the Due Process Clause. *Cleveland Board of Education v. LaFleur, supra; United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) (concurring opinion); *Vlandis v. Kline, supra; Stanley v. Illinois, supra; Bell v. Burson*, 402 U.S. 535 (1971); *Carrington v. Rash*, 380 U.S. 89 (1965).

This Court should examine this arbitrary exercise of power which has cut off as unenforceable petitioner's

property rights, especially with the ultimate beneficiary of the rights so divested being the State itself. The Due Process Clause required the Georgia Court to make further inquiry before denying enforcement of petitioner's claim.

V.

The Failure By the Supreme Court of Georgia to Give Effect in This Action to the Laws of the State of New York Contravenes the Full Faith and Credit Clause of Article Four of the Constitution.

While the Full Faith and Credit Clause does not compel a state to adopt any particular set of rules governing conflict of laws, the Clause nonetheless sets certain minimum requirements which each state must observe when asked to apply the law of a sister state. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). In this case, petitioner has brought suit in the courts of the State of Georgia asserting rights which accrued to her under an agreement made in New York and, as shown by the evidence of record, to be performed in New York. Whether the State of Georgia may, in such circumstances, close the doors of its courts to the enforcement of rights created under the laws of New York raises a fundamental question of full faith and credit over which this Court must be the ultimate arbiter. *First National Bank of Chicago v. United Airlines*, 342 U.S. 396 (1952); *Hughes v. Fetter*, 341 U.S. 609 (1951); *John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936).

Petitioner has asserted in both the trial court and before the Supreme Court of Georgia that the laws of the State of New York should govern the rights and

obligations of the parties under the agreement in this case. The evidence of record shows that the agreement itself was made in New York and was to be performed in that State. Moreover, the record is devoid of any indication that the parties intended any law other than that of New York to control their rights under the agreement. Under the applicable New York law, the agreement would be fully enforceable between the parties. *In Re Estate of Fleischmann*, 64 Misc. 2d 924, 316 N.Y.S.2d 272 (1970) (cited in petitioner's brief to the Supreme Court of Georgia). The Georgia Courts, however, have refused to enforce the agreement and have thereby refused to give full faith and credit to the applicable New York law, contrary to the mandate of Article Four.

The opinion rendered by the Georgia Court states, in effect, that full faith and credit will not be accorded to New York law in this case because such recognition would violate a public policy of the State of Georgia. The opinion refers to a public policy which encourages matrimonial harmony in the State of Georgia, and then rules *as a matter of law* that any agreement involving a promise to marry made with a person who is already married violates that policy and cannot be enforced. This rationale given by the Georgia Court for refusing to recognize New York law cannot overcome the mandate of the Full Faith and Credit Clause. The cases cited by petitioner in her brief to the Supreme Court of Georgia show convincingly that the policy of encouraging marital harmony is not compromised by the agreement in this case. *Guffin v. Kelly*, 191 Ga. 880, 14 S.E. 2d 50 (1941); *Sumner v. Sumner*, 121 Ga. 1, 48 S.E. 727 (1904); *Melton v. Hubbard*, 135 Ga. 128, 68 S.E. 1101 (1910). Further, in *Bennet v. Bennet*, 157 Ga. 848, 122 S.E. 616 (1924), the Georgia Court held that the proper inquiry

for determining whether a contract violated the policy in favor of marital harmony was whether the contract at issue promoted the dissolution of an existing marriage. The record in this case clearly shows that the 1945 agreement did not promote the dissolution of Richard J. Reynolds's then-existing marriage, for that marriage was already estranged beyond reconciliation. The Full Faith and Credit Clause does not allow a state court to decline to enforce foreign contracts as violative of an impermissable local public policy without review of that determination by this Court. *See Hughes v. Fetter, supra.*

In light of the foregoing, petitioner submits that the denial of full faith and credit by the Georgia courts does not further a legitimate state policy, and that Article Four requires the application of New York law to this case.

CONCLUSION

The decision of the Supreme Court of Georgia works an unpredictable and clearly erroneous change in state law; establishes and applies an unconstitutional "public policy" to petitioner, the result of which is to benefit the State itself; and exercises judicial power in an arbitrary and unconstitutional manner. The decision resulted in petitioner's property being taken by the State for public purposes without compensation, and deprived her of rights under the Fifth and Fourteenth Amendments of the Constitution of the United States as to due process and equal protection.

For all the foregoing reasons, petitioner prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM L. O'CALLAGHAN, JR.

Suite 360, Prado North
5600 Roswell Road
Atlanta, Georgia 30342
(404) 252-2400

C. HARRIS DITTMAR

1500 Barnett Bank Building
112 West Adams Street
Jacksonville, Florida 32202
(904) 353-0211

Attorneys for Petitioner

Of Counsel:

JOHN D. SAUNDERS
RICHARD L. STUMM
GENE B. MCCLURE
O'Callaghan, Saunders & Stumm
Suite 360, Prado North
5600 Roswell Road
Atlanta, Georgia 30342

JOHN F. CALLENDER
Bedell, Bedell, Dittmar & Zehmer
1500 Barnett Bank Building
112 West Adams Street
Jacksonville, Florida 32202

CERTIFICATE OF SERVICE

I hereby certify that I am counsel of record for the petitioner, Marianne O'Brien Reynolds, and that I have this day served the within and foregoing "Petition for Writ of Certiorari to the Supreme Court of Georgia" upon all parties to this action, by mailing three correct copies of same, first-class mail, postage prepaid, to their respective counsel of record at their last known addresses:

John M. Tatum, Esq.
Miller, Beckmann & Simpson
Post Office Box 1567
Savannah, Georgia 31402

Daniel H. White, Esq.
Post Office Box 475
Darien, Georgia 31305

Patricia T. Barmeyer, Esq.
132 State Judicial Building
40 Capital Square, S.W.
Atlanta, Georgia 30334

Wallace E. Harrell, Esq.
Bennett, Gilbert, Gilbert, Whittle,
Harrell & Gayner
Post Office Box 190
Brunswick, Georgia 31402

Earle B. May, Jr., Esq.
Jones, Bird & Howell
Fourth Floor
Haas-Howell Building
Atlanta, Georgia 30303

This 22nd day of February, 1977.

/s/ WILLIAM L. O'CALLAGHAN, JR.
WILLIAM L. O'CALLAGHAN, JR.

INDEX OF APPENDICES

Appendix I	Order of the Supreme Court of Georgia denying petitioner's Motion for Rehearing (November 23, 1976)
Appendix II	Opinion and Judgment of the Supreme Court of Georgia affirming grants of summary judgment in favor of respondents (November 3, 1976)
Appendix III	Order of the McIntosh County Superior Court granting motion for summary judgment of respondents Nancy S. Reynolds and Herrick K. Lidstone (August 26, 1976)
Appendix IV	Order of the McIntosh County Superior Court granting motion for summary judgment of respondent State of Georgia (July 21, 1976)
Appendix V	Order of the McIntosh County Superior Court granting motions for summary judgment of respondents Sapelo Island Research Foundation, Inc.; Luhr G. C. Beckmann, Jr.; Alfred W. Jones, Sr.; James Wright; Ed R. Gray, Jr.; and Ledyard S. Staples (July 21, 1976)
Appendix VI	Petitioner's Motion for Rehearing to the Supreme Court of Georgia and Supporting Argument (November 12, 1976)
Appendix VII	Georgia Statutes

APPENDIX I

31642, 31676

SUPREME COURT OF GEORGIA

Atlanta, November 23, 1976

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Marianne O'Brien Reynolds v. Estate of R. J. Reynolds, et al.

Marianne O'Brien Reynolds v. Nancy S. Reynolds et al.

Upon consideration of the Motion for Rehearing filed in these cases, it is ordered that it be hereby denied. Hill, J. disqualified.

SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta, February 15, 1977

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ HAZEL E. HALLFORD
Deputy Clerk

APPENDIX II.

In the Supreme Court of Georgia.

Decided: Nov. 3, 1976

31642. REYNOLDS v. ESTATE OF R. J. REYNOLDS ET AL.

31676. REYNOLDS v. REYNOLDS ET AL.

NICHOLS, Chief Justice.

These appeals arise from a complaint filed by Marianne O'Brien Reynolds in the Superior Court of McIntosh County against the estate of R. J. Reynolds, deceased, Annemarie S. Reynolds, and others including the State of Georgia.

The plaintiff claims title to Sapelo Island as a result of a handwritten prenuptial agreement between the plaintiff and the late Richard J. Reynolds whereby "for and in consideration of the sum of $10.00 and other valuable consideration" he did convey to the plaintiff all the common stock of Sapelo Plantation, Inc. by bill of sale and further did agree to transfer the stock upon the books of the Sapelo Plantation, Inc. on or before sunset, October 20, 1945. The complaint alleges that the transfer of said common stock from Richard J. Reynolds was tantamount to the transfer of ownership of the 16,000 acres, more or less, of realty lying and situated on Sapelo Island, Georgia to which said corporation held title. No transfer of such stock ever took place, although Richard J. Reynolds told her that the stock had been transferred.

The complaint alleged in part that on the 20th day of October, 1945, plaintiff was an unmarried female residing in the State of California, and said plaintiff became involved in the romantic attachment with Richard

J. Reynolds. As a result of the romantic attachment, Richard J. Reynolds proposed marriage to plaintiff. At the time that the said Richard J. Reynolds proposed marriage to plaintiff, she was a movie star engaged in making and producing motion pictures in Hollywood, California, and earning as a result of her profession, a sizable income in her own right. Richard J. Reynolds entreated plaintiff to forego her career as a star actress in the motion picture industry and to marry him and return with him, upon his discharge from the armed services of the United States, to Sapelo Island, Georgia and to live there with him as his wife. Plaintiff, being mindful of the uncertainty of marriage and knowing that Richard J. Reynolds had had a prior unsuccessful marriage, was hesitant to accept the proposal of marriage to Richard J. Reynolds and forego the lucrative career which she had established for herself in the motion picture industry. In order to entice plaintiff to accept the proposal of marriage, the said Richard J. Reynolds did execute on the 20th day of October, 1945, a handwritten prenuptial agreement with the plaintiff in which Richard J. Reynolds for and in consideration of the sum of $10.00 and the agreement of plaintiff to marry him, did convey to plaintiff all the common stock of Sapelo Plantation, Inc. by bill of sale and further did agree to transfer the stock upon the books of Sapelo Plantation, Inc. on or before midnight of this date. The transfer of the said common stock from Richard J. Reynolds to plaintiff was tantamount to ownership of said 16,000 acres, more or less of realty which of said corporation held to title, said realty lying and situated on Sapelo Island, Georgia.

The stock was not transferred on the books of the corporation, although Richard J. Reynolds told the plaintiff that it had been so transferred. During subsequent

years the property was sold, corporations dissolved and new corporations formed, a portion of the property sold to the State of Georgia and other transfers made.

The plaintiff seeks to set aside such deeds, obtain the island as well as other relief.

Exhibits submitted in support of the motions for summary judgment include copies of the divorce complaint (filed after the "Bill of Sale" was executed) against Richard J. Reynolds by his then wife Elizabeth Dillard Reynolds and the divorce decree dated June 14, 1946.

The judgment of the trial court granting summary judgments to numerous defendants on multiple grounds was dated July 21, 1976. A second summary judgment was granted to other defendants on August 26, 1976 and the appeals are from these judgments. The first ground upon which summary judgment was granted was that the contract was void as being against public policy inasmuch as its consideration was a promise to marry a person then married. As such, the contract was one promoting the dissolving of a marriage in conflict with public policy of Georgia which favors the preservation of marriage.

1. " 'Facts alleged, positively, are constructive admission in favor of the defendant, of the facts so alleged, and, therefore, need not be proved by other evidence. The plaintiff by introducing them in his bill, and making them a part of the record precludes himself from disputing their truth, whether they be true or false. The allegations and admissions of the complainant's bill are, therefore, evidence against him,' *Peacock v. Terry,* 9 Ga. 137 (6), 150. See also *Field v. Manly,* 185 Ga. 464, 466 (195 S. E. 406); *Youngblood v. Youngblood,* 74 Ga. 614 (2); *Hampton v. Thomas,* 11 Ga. 317, 320; *New Zealand*

Fire Ins. Co. v. Brewer, 29 Ga. App. 773 (6) (116 S. E. 922). Under this ruling, the plaintiff was bound by the solemn and unstricken allegation contained in her petition, which was admitted by the answer . . . *East Tennessee Railway Co. v. Kane,* 92 Ga. 187 (5), 193 (18 S. E. 18, 22 L. R. A. 315)." *Carver v. Carver,* 199 Ga. 352 (1) (34 SE2d 509) (1945). See also *Corr v. Corr,* 213 Ga. 699, 701 (100 SE2d 922) (1957) and citations.

Accordingly, those allegations of the plaintiff's complaint which disclose that the handwritten prenuptial agreement between the plaintiff and Richard J. Reynolds was in consideration of the sum of $10.00 and the agreement of plaintiff to marry him at a time when he was then married to another person cannot be disputed, nor can the allegation that the common stock was never transferred on the books of the corporation be disputed.

Under the dissenting opinion of Presiding Justice Atkinson in the case of *Guffin v. Kelly,* 191 Ga. 880, 891 (14 SE2d 50) (1941), adopted by this court in a full bench opinion (*Morgan v. Wright,* 219 Ga. 385, 387, 133 SE2d 341, 1963), requires that the judgment of the trial court granting the defendant's motions for summary judgment as to Counts One through Six be affirmed.

The dissent of Presiding Justice Atkinson adopted in *Morgan,* supra, reads as follows: "In 1 Pomeroy's Equity Jurisprudence (4th ed.), 738, § 397, it is said: 'The maxim . . . he who comes into equity must come with clean hands, . . . assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject matter or transaction in question. It says that whenever a party, who,

as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' In § 401 illustrations are given for application of the principle where the plaintiff's claim is affected by his own fraud. It is said: 'If a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the fraudulent parties — a particeps doli, while the agreement is still executory, either compel its execution or decree its cancellation, nor, after it has been executed, set it aside, and thus restore the plaintiff to the property or other interests which he had fraudulently transferred. Equity will leave such parties in exactly the position in which they have placed themselves, refusing all affirmative aid to either of the fraudulent participants.' In § 402 illustrations are given for application of the principle where illegality of the transaction was involved and the parties were in pari delicto. It is said: 'The principle is thus applied in the same manner when the illegality is merely a malum prohibitum, being in contravention to some positive statute, and when it is a malum in se as being contrary to public policy or to good morals. Among the latter class are agreements and transfers the consideration of which was violation of chastity, compounding of a felony, gambling, false swearing, the commission of any crime, or breach of good morals.' See *Watkins v. Nugen,* 118 Ga. 372 (45 S. E. 260); *Deen v. Williams,* 128 Ga. 265 (3, 4) (57 S. E. 427); 7 Words and Phrases 444, and cit.; 21 C. J. 180, §§ 163, 171, 173, 177, 178, and cit.

"The plaintiff Kelly seeks the aid of equity to escape the results of his conduct in causing legal title and

possession of the land to be vested in the woman (now Mrs. Guffin), which she afterwards conveyed to her mother, Mrs. Kay. Being himself a married man, his agreement to intermarry with the woman, now Mrs. Guffin, was contrary to public policy which encourages matrimonial harmony. In these circumstances the participation of the plaintiff in the enterprise was contrary to public policy, and with respect to the matter now in question put him in the position of one who under the rules of equity has not clean hands. The case is not altered by the subsequent conveyance by the woman to her mother. The mother as grantee in such conveyance stands in the shoes of the daughter, and, without resort to the merits of the plaintiff's demand, may suggest that the plaintiff comes not with clean hands, and consequently may not enjoy remedies that might otherwise be afforded in equity. If it were otherwise, the wholesome general rule could be avoided wherever there was alienation of the property, notwithstanding the plaintiff's hands remained defiled. In the circumstances equity will not declare a trust in favor of the plaintiff or grant him other relief, but will leave the parties and the property where it finds them, with full legal title vested in the mother."

Under this decision, the trial court did not err in granting the defendant's motion for summary judgment on the first six counts of the complaint.

2. Count Seven of the plaintiff's complaint alleges that the Sapelo Island Research Foundation, Inc. was formed in order to protect the property owned by Richard J. Reynolds and to preserve the island for the benefit of his heirs and to avoid certain property, estate and income taxes. The evidence adduced regarding this Seventh Count of the complaint discloses that there was no written instrument which would preserve the island

for the benefit of the heirs of Richard J. Reynolds of the plaintiff.

The statute of frauds (Code § 20-401(4)) requires that any contract involving an interest in lands be in writing. While an exception to this rule applies in certain instances where part performance has taken place, yet under the evidence adduced in support of the motions for summary judgment, there had been no performance, and the claim under this count of the complaint was based solely upon an oral promise by Richard J. Reynolds prior to his death and such claim cannot be enforced. Accordingly, the trial court did not err in granting the summary judgments upon this count of the complaint. Compare *Cook v. Pridgen &c.*, 45 Ga. 331 (1872); *Berolzheimer v. Taylor,* 230 Ga. 595, 600 (198 SE2d 301) (1973).

Judgments affirmed. All the Justices concur, except Gunter & Hall, J. J. who concur in the judgment only and Hill, J. disqualified.

APPENDIX III

STATE OF GEORGIA
COUNTY OF McINTOSH

IN THE SUPERIOR COURT OF SAID STATE AND COUNTY

MARIANNE O'BRIEN REYNOLDS,
Plaintiff

versus

ESTATE OF
RICHARD J. REYNOLDS,
DECEASED, ET AL,
Defendants

CIVIL ACTION
NO. 2477

ORDER

The individual motions of the defendants Nancy S. Reynolds and Herrick K. Lidstone for summary judgment having come on regularly to be heard, and after consideration of arguments of counsel and all the pleadings and documentary evidence submitted in this matter, it is the opinion of this Court that there is no genuine issue of material fact as to the plaintiff's claims against either of said defendants and each of them is entitled to summary judgment as a matter of law on each and every count.

The Court incorporates herein by reference the findings of fact and conclusions of law stated in its order dated July 21, 1976 granting summary judgment in this action to the defendant Sapelo Island Research Foundation, Inc. and other named defendants as fully as it the same were set forth verbatim herein.

In addition to the conclusions of law stated in the aforesaid Order, the Court further concludes

(1) Plaintiff is incompetent to testify in her own favor as to communications with R. J. Reynolds, her deceased husband, and each of these defendants are entitled to and have properly invoked the applicable provisions of the Georgia Dead Man's Statute. *Ga. Code* § 38-1603(2), (3); *Nottingham v. Wrigley*, 221 Ga. 386, 388.

(2) As the ex-wife of R. J. Reynolds, Muriel Reynolds is incompetent to testify respecting communications with her husband which were intended to be confidential or which constitute knowledge acquired through marital confidence. *Ga. Code* §38-418(1); *Lingo v. State*, 29 Ga. 470, 483-484; *McKie v. State*, 165 Ga. 210; *Lowry v. Lowry*, 170 Ga. 349.

(3) For these reasons, all such testimony should be and has been excluded from consideration because it fails to set forth facts which would be admissible in evidence. *Ga. Code* § 81-A-156(e); *Matthews v. Wilson*, 119 Ga. App. 708, 711.[1]

(4) The alleged pre-nuptial agreement upon which plaintiff bases her right to recovery being void, illegal and unenforceable for the reasons stated in the Order of July 21, 1976, no legally enforceable rights accrued to plaintiff under such agreement and the claimed conspiracy to defraud plaintiff of such non-existent rights cannot be sustained as a matter of law. *Ranck & Keefe, Inc. v. First Richmond Corp.*, Civil Action No. 52101, decided May 6, 1976.

(5) The Court having concluded in its Order of July 21, 1976 that the August 7, 1952 Florida divorce decree and other releases executed by plaintiff constituted a full relief (sic) by the plaintiff of Richard J. Reynolds or his estate, plaintiff cannot maintain the instant action against these defendants as joint tort feasors because the release in favor of Reynolds released these parties from liability as a matter of law. Weems v. Freeman, 234 Ga. 575.[2]

---

[1] Even it (sic) such testimony had been given consideration, the decision of the Court would nevertheless be the same for the reasons stated in the Order of July 21, 1976 and the additional reasons set forth in this Order.

[2] The plaintiff likewise has no standing to maintain the claim sought to be asserted in Court VI for the reason that it constitutes a collateral attack upon the paternity of Irene Sabina Reynolds and is barred as a matter of law by reason of the provisions of the Agreement executed by plaintiff in December 1965 in the Surrogate's Court of New York wherein R. J. Reynolds is expressly recognized as the father of Irene Sabina Reynolds.

(6) The claims sought to be asserted in Count VII are barred as a matter of law for each of the following reasons:

(a) Plaintiff is incompetent to testify in her favor regarding communications with her deceased husband and any testimony relating to alleged oral promises made by R. J. Reynolds is inadmissible as a matter of law.

(b) The alleged agreement asserts ownership of a beneficial interest in real property and, not being in writing, enforcement is barred by reason of the provisions of the Statute of Frauds. *Ga. Code* § 20-401(4). A permanent easement in the land of another is an interest in the land and a parol license to enjoy such easement is void under the Statute of Frauds. *Cook v. Pridgen, et al.*, 45 Ga. 331.

(c) Both Nancy S. Reynolds and Herrick K. Lidstone became Trustees of Sapelo Island Research Foundation, Inc., after the Foundation acquired title to portions of Sapelo Island and subsequent to the death of R. J. Reynolds. Neither of said defendants has ever claimed and do not now claim any right, title or interest in or to the real property constituting Sapelo Island nor any part thereof. (Affidavits of Nancy S. Reynolds and Herrick K. Lidstone.)

IT IS THEREFORE ORDERED that the individual motions of defendants Nancy S. Reynolds and Herrick K. Lidstone for summary judgment be and the same are hereby GRANTED on each and every ground and final judgment is hereby entered in favor of each of said defendants, the Court having expressly determined that

there is no just reason for delay in the entry of final judgment in favor of said defendants.

This the 26th day of August 1976.

/s/ JOHN R. HARVEY, Judge
McIntosh Superior Court

APPENDIX IV

STATE OF GEORGIA

COUNTY OF McINTOSH

IN THE SUPERIOR COURT OF SAID STATE AND COUNTY

MARIANNE O'BRIEN REYNOLDS, Plaintiff versus ESTATE OF RICHARD J. REYNOLDS, DECEASED, ET AL, Defendants	CIVIL ACTION NO. 2477

ORDER

The State of Georgia, defendant herein, has moved for summary judgment on numerous grounds.

After hearing oral argument and considering the written briefs of counsel, and upon consideration of the pleadings and all evidence. The Court incorporates by reference its findings of fact and conclusions of law stated in its order entered on this date granting summary judgment in this action to the defendants, Sapelo Island

Research Foundation, Inc., Alfred W. Jones, Sr., Ledyard S. Staples, Luhr G. C. Beckmann, Jr., Edward R. Gray, Jr., and James Wright. In addition this court finds that Plaintiff's complaint against the State of Georgia is barred by the doctrine of sovereign immunity.

This Court further finds that there is no genuine issue as to any material fact as to the plaintiff's claim against the State of Georgia and that the State of Georgia is entitled to summary judgment as a matter of law. The State of Georgia's motion for summary judgment is hereby GRANTED on each and every ground thereof and judgment is hereby entered in favor of the defendant the State of Georgia.

Pursuant to Ga. Code Ann. § 81A-154(b), the Court hereby expressly directs the entry of the final judgment in this case in favor of the defendant the State of Georgia, based upon the court's express determination that there is no just reason for delay in taking such action.

SO ORDERED, this the 21st day of July 1976.

/s/ JOHN R. HARVEY, Judge
McIntosh Superior Court

APPENDIX V

STATE OF GEORGIA
COUNTY OF McINTOSH
IN THE SUPERIOR COURT OF SAID
STATE AND COUNTY

MARIANNE O'BRIEN REYNOLDS,
Plaintiff
versus
ESTATE OF
RICHARD J. REYNOLDS,
DECEASED:
ANNEMARIE S. REYNOLDS,
Individually and as Executrix of
the Estate of Richard J. Reynolds,
Deceased; NANCY S. REYNOLDS,
ED R. GRAY, JR., ALFRED W.
JONES, SR., and HERRICK K.
LIDSTONE, Individually and as
Members of the Board of Directors
of Sapelo Island Research
Foundation, Inc.; SAPELO
PLANTATION, INC., a Georgia
corporation; STRATTON COYNER,
Individually and as Secretary of
Sapelo Plantation, Inc.; THE
BOARD OF DIRECTORS OF
SAPELO ISLAND RESEARCH
FOUNDATIONS, INC. to wit,
Annemarie S. Reynolds, Ledyard S.
Staples, Luhr G. C. Beckmann, Jr.,
James Wright, and Richard Pough;
SAPELO ISLAND RESEARCH
FOUNDATION, INC., a Georgia
corporation; AMERICAN
PROPERTIES, INC., a Georgia
corporation; and THE STATE
OF GEORGIA,
Defendants

CIVIL ACTION
NO. 2477

JUDGMENT AND DECREE

This action was commenced on December 31, 1975, when the Plaintiff filed a seven-count complaint alleging that on or about October 20, 1945, Richard J. Reynolds executed an agreement by which he agreed to deliver to Plaintiff all of the stock in Sapeloe Plantation, Inc., a corporation which owned Sapelo Island. In response, certain defendants namely, Sapelo Island Research Foundation, Inc.; Luhr G. C. Beckmann, Jr.; Alfred W. Jones, Sr.; James Wright; Ed R. Gray, Jr.; and Ledyard S. Staples filed affirmative pleas and motions to dismiss, which will be ruled on in this Judgment and Decree.

Said Defendants subsequently filed their motions for summary judgment addressed to the affirmative defenses and to the complaint. Oral argument was had on June 16, 1976, at which time all named defendants and plaintiff were represented by counsel, and after hearing oral arguments of counsel representing all parties and considering all documentary evidence submitted in this matter, this Court makes the following findings of fact and conclusions of law.

This Court finds the following facts to be uncontradicted in the record:

1. The agreement upon which Plaintiff seeks to recover was given in consideration of a promise to marry (agreement of October, 1945).

2. At the time of said agreement, Plaintiff had knowledge of the fact that Richard J. Reynolds was then married to Elizabeth Dillard Reynolds.

3. The marriage to Elizabeth Dillard Reynolds was dissolved on July 14, 1946.

4. Any confidential relationship which existed between Plaintiff and Richard J. Reynolds was dissolved in 1951 when her then-husband asked for a divorce, or on August 7, 1952, when a final divorce was granted to the Plaintiff.

5. The divorce decree, including a property settlement agreement, contains a full release and an accord and satisfaction of all property rights existing between the parties who were represented by independent counsel of their choice. In addition, Plaintiff's answer to the divorce complaint states that her husband owns a home on Sapelo Island, and the settlement agreement states that she has determined all assets of the husband.

6. Subsequent to the death of Richard J. Reynolds, Plaintiff did on December 1, 1965, execute a release acknowledging Annemarie S. Reynolds to be the widow of the deceased, the sole beneficiary under his Last Will and Testament and duly appointed Executrix of the estate of the deceased and released said parties from any further claim.

7. A deed for valuable consideration from Sapelo Plantation, Inc., to Richard J. Reynolds has appeared on public record in McIntosh County since November 15, 1949.

8. The dissolution of Sapeloe Plantation, Inc., has appeared on public record in McIntosh County since January 21, 1950.

9. Plaintiff admits by deposition that she knew what her husband had for she signed a joint income tax return during marriage. The 1950 return reflects the dissolution of Sapeloe Plantation, Inc., and transfer of assets to Plaintiff's husband.

10. A deed from Richard J. Reynolds to Sapelo Island Research Foundation, Inc., has appeared on public record in McIntosh County since December 9, 1959.

11. A deed from R. J. Reynolds to American Properties, Inc., has appeared on public record in McIntosh County since January 13, 1964.

12. Temporary letters of administration showing the residence of Richard J. Reynolds at the time of his death have appeared on record in McIntosh County since August 17, 1965, and the administrators of the estate of Richard J. Reynolds in the State of Georgia terminated on February 5, 1968, by the dismissal of the First National Bank of Brunswick as administrators in this estate.

13. On December 1, 1965, Plaintiff executed a release acknowledging Annemarie S. Reynolds as the widow of Richard J. Reynolds, the sole beneficiary of his estate, the qualified Executrix thereof, and his heir and that Richard J. Reynolds died domiciled in Emmetten, Niwaldern, Switzerland on December 14, 1964. Plaintiff, in verified pleadings before the Surrogate Court of New York, acknowledged the foregoing in order to effect a settlement of $500,000.00 to each of her two (2) sons.

In addition to the above specified portions of the record, the Court has considered the record in its entirety and finds that there has been no continuing conspiracy as shown by the affidavit of the trustees, who are movants in this motion.

The Court realizes that there are several grounds for the motions before the Court and the granting of any one of the motions would render rulings on the rest of the motions moot, however, in order to fully dispose of the matter before this Court; rulings are hereby rendered in the alternative on each and every ground.

CONCLUSIONS OF LAW

This Court concludes that Plaintiff's agreement with R. J. Reynolds, Jr., identified as Exhibit M in Defendant's Motion for Summary Judgment, *is void* as *against the public* policy of the State of Georgia. Although the agreement with Mr. Reynolds was executed in the State of New York the public policy of this state controls litigation in this state irrespective of where an alleged agreement has been entered into.

The courts of this state will not enforce the laws of other states where it is found that they are contrary to the public policy of this state. *Sally v. Bank of Union.* 150 Ga. 281 (1920).

The public policy of Georgia favors the preservation of marriage, and contracts which promote the dissolving of a marriage offends the public policy of this state and are, therefore, illegal and void. *Reynolds v. Reynolds,* 217 Ga. 234 (1961).

A contract founded on a promise of marriage entered into by one who is then married is void as being opposed to the public policy of the State of Georgia, even though the proposed marriage is not to occur unless and until the promisor is divorced. *Jones v. Sovereign Camp, Woodmen of the World,* et al, 35 F. 2d 345 (1929) (Georgia Case). This statement of the law was cited with approval in the case of *Guffin v. Kelley,* 191 Ga. 880.

This Court concludes that the contract upon which Plaintiff's case is founded is illegal and void, therefore, movants' motion for summary judgment is sustained on this ground and the plaintiff's complaint is hereby dismissed against the movants.

This Court concludes that Plaintiff's complaint is barred by the statute of limitations and is also barred

by her failure to file her suit based on an alleged prenuptial agreement during the lifetime of the promissor former husband, Richard J. Reynolds, deceased.

The statute of limitations of this state apply in this Court. *Taylor v. Murray,* 231 Ga. 852 (1974); *Fimian v. Guy F. Atkinson Co., et al,* 209 Ga. 113 (1952); *Gaffe v. Williams,* 68 Ga. App. 299 (1942). The alleged prenuptil agreement to be performed on October 20, 1945 is, at best, a simple contract in writing which is governed by the six (6) year statute of limitations on such actions. *Ga. Code Ann.* § 3-705.

The Plaintiff's claims would be barred by any other statute of limitation which might arguable apply to her. An action to recover corporate stock is barred by the four (4) year period of limitation applicable to actions to recover personalty. *Ga. Code Ann.* § 3-1003. A suit to cancel deeds is barred seven (7) years from the execution of the deed. *Stephens v. Walker,* 193 Ga. 330 (1942). "The period of limitation applicable to an action for fraud in procuring the title to land . . . is *seven years* from the discovery of the fraud" only if the Plaintiff has *exercised proper diligence* to *discover* the *fraud. Jones v. Johnson,* 203 Ga. 282 (1948). There is some conflict as to whether the period of limitation for an action to impress land with a trust is seven (7) or ten (10) years. See *Denson v. Denson,* 214 Ga. 8, 9 (1958). In either event, the statutory period begins to run when the Plaintiff is charged with notice of an adverse claim. *Denson v. Denson,* supra. *The recording of a deed is notice of an adverse claim* and the period of limitation begins to run at that time. *Denson v. Denson,* supra; *Shepherd v. Frazier,* 233 Ga. 874 (1968).

Actions to set aside judgments for fraud must be brought within three (3) years from the entry of the

judgment. *Ga. Code Ann.* § 81A-160(f); 126 Ga. App. 598; 230 Ga. 697.

The Plaintiff contends that any statute of limitations which applies has been tolled and argues that when fraud is involved, the statute of limitations does not begin to run until the fraud has been discovered by the Plaintiff. However, fraud which will toll the statute of limitations must be actual fraud involving moral turpitude accompanied by *concealment of the true facts. Middleton v. Pruden,* 57 Ga. App. 555 (1938); *Stephens v. Walker,* 193 Ga. 330 (1942); *Rucker v. Mobley,* 44 Ga. App. 705 (1932). If the fraud is of such a nature that it can be or could have been discovered by the exercise of reasonable diligence, then the statute of limitations will not be tolled. *Middledton v. Pruden,* 57 Ga. App. 55 (1938). A party cannot be guilty of fraudulent concealment, *as a matter of law,* where deeds disclosing adverse claims to real estate are recorded in public records. E.g., *Middleton v. Pruden,* supra, *Stephens v. Walker,* 193 Ga. 330 (1942). Where the alleged fraud occurred more than fourteen (14) years prior to the Petition and is based on matters duly recorded in the public records an allegation of diligence, or lack of diligence is unimportant. As a matter of law, the alleged defrauded party has failed to exercise the due diligence imposed on her by law. *Jones v. Johnson,* 203 Ga. 282 (1948).

Whether or not the confidential relationship claimed by the Plaintiff did exist, it was the Plaintiff's legal right, if she were a stockholder as she contends, to examine the records of Sapeloe Plantation, Inc. and ascertain for herself such facts as those records would disclose. *Comolli v. Coggins,* 200 Ga. 620 (1946). Where one alleging fraud on a stock transaction delayed filing suit for twenty-four (24) years, as a matter of law he

has failed to exercise the due diligence to investigate stock records and, therefore, her complaint was dismissed. *Comolli v. Coggins*, et al, 200 Ga. 620 (1946).

The final fact which establishes beyond any question that the Plaintiff not only should have known, but has actually known of adverse claims is contained in the 1950 joint income tax return, and a settlement agreement dated December 1, 1965.

Any action based on an alleged pre-nuptial agreement must be brought during the life time of the promisor husband. It is uncontradicted that this suit was filed subsequent to the death of Richard J. Reynolds, deceased, and is therefore barred by *Ga. Code Ann.* § 53-401. *Wilcox v. Wilcox*, 225 Ga. 427 (1969).

Therefore, movants' motion on the statute of limitations, laches and her failure to bring the action in the lifetime of the promisor husband is hereby sustained and Plantiff's complaint as to movants is hereby dismissed.

This Court concludes as a matter of law that Plaintiff has no standing to attack the validity of the will of the deceased, nor any probate proceedings, and therefore, Movant's motion is sustained on those counts in which she seeks to attack the will and probate proceedings of the estate of Richard J. Reynolds, deceased, and said complaint is hereby dismissed.

Plaintiff seeks to have probate proceedings on the estate of Richard J. Reynolds set aside and declared null and void, and that his Georgia properties pass as in the case of intestacy.

Under Georgia Law, when a marital tie has been dissolved by divorce, the wife ceases to be a member of the husband's family as effectually as if she were dead.

Hewlett v. Hewlett, 221 Ga. 349 (1965); *Harrison v. Harrison*, 208 Ga. 70; *Clark v. Clark*, 213 Ga. 342. After a divorce, the wife no longer has any interest whatsoever in the husband's estate and does not have standing to file a caveat to a probate proceeding. *Gore v. Plair*, 173 Ga. 88.

This Court finds that as a matter of law that the divorce decree of August 7, 1952, and other releases executed by the Plaintiff as stated in the findings of fact and her other actions constitute an accord and satisfaction and full relief by the Plaintiff of Richard J. Reynolds or his estate.

Where there is an pre-nuptial agreement unexecuted, followed by divorce including a property settlement, the ex-wife has no interest in the estate of the ex-husband to enforce the pre-nuptial agreement. *Hewlett, Executor v. Almand, et al*, 25 Ga. App. 346 (1920). An existing contract is superseded and discharged whenever the parties enter into a valid and inconsistent agreement completely covering the subject matter embraced by the original contract. It is uncontradicted that the "subject matter" in this case is the financial security of the Plaintiff. See also *Ga. Code Ann.* §§ 20-1205 and 20-905.

In view of the foregoing law as applied to the facts herein above stated, Movants' motion founded on accord and satisfaction and release is hereby sustained and as to these Movants, the Plaintiff's complaint is dismissed.

This Court concludes that as a matter of law that Plaintiff is not entitled to relief prayed for in her complaint since she has entered into a binding property settlement which is made a part of the divorce decree dissolving her marriage with Richard J. Reynolds. In effect, this amounts to an attempt to nullify a decree and

judgment of a court of competent jurisdiction. Divorce decrees entered by courts of other states after personal service, a general appearance, and a defense on the merits are not subject to collateral attack in the courts of this state and must be given full force and effect. *Joiner v. Joiner,* 227 Ga. 545 (1971); *Campbell v. Campbell,* 231 Ga. 214 (1973).

In view of the foregoing law as applied to the facts hereinabove stated Movants' motion on this ground is hereby sustained and as to these Movants, Plaintiff's complaint is dismissed.

This Court concludes that as a matter of law that Sapelo Island Research Foundation, Inc. is a bonafide purchaser for value.

Movant Sapelo Island Research Foundation, Inc., stands in a position of a bonafide purchaser without notice of any adverse claim. The individual Movants who are sued as trustees and who have been accused of knowledge of the alleged prenuptial agreement have denied this by affidavit. The bonafide purchaser for value without notice of an adverse claim will not be interferred with. *Ga. Code* § 37-111, *Gleaton v. Wright,* 149 Ga. 220. The record shows that the conveyance from Sapelo Foundation, Inc., to Richard J. Reynolds was for valuable consideration. The conveyance from Richard J. Reynolds to the Foundation was for valuable consideration for it afforded to the said Richard J. Reynolds an income tax deduction for a bequest to a charitable organization which amounts to a benefit to the Grantor.

This Court is well aware that on a motion for summary judgment the evidence must be construed in favor of the party opposing the motion. *White v. Frontpage, Inc.,* 133 Ga. App. 749 (1975).

This Court concludes after studying the record of this case in its entirety and based on the evidence submitted that there is no material genuine factual issues of substantial controversy and Movants are entitled to judgment in their favor as a matter of law on each and every count.

Therefore, it is ordered and adjudged that Movants' motion for summary judgment is hereby sustained and Plaintiff's complaint as to the Movants' herein is hereby dismissed on each and every ground.

This Court expressly determined that there is no just reason for delay in the entry of final judgment in favor of the Defendants, namely, Sapelo Island Research Foundation, Inc.; Luhr G. C. Beckmann, Jr.; Alfred W. Jones, Sr.; James Wright; Ed R. Gray, Jr.; and Ledyard S. Stapes, and directs the entry of final judgment in favor of those defendants and this judgment shall become final upon its being filed with the Clerk of this Court.

SO ORDERED, this the 21st day of July 1976.

/s/ JOHN R. HARVEY, Judge
McIntosh Superior Court

APPENDIX VI

IN THE SUPREME COURT OF GEORGIA

MARIANNE O'BRIEN REYNOLDS,
Appellant
vs.
ESTATE OF RICHARD J. REYNOLDS, deceased, ANNEMARIE S. REYNOLDS, individually and as executrix of the Estate of Richard J. Reynolds, deceased; NANCY S. REYNOLDS, ED R. GRAY, JR., ALFRED W. JONES, SR., and HERRICK K. LIDSTONE, individually and as members of the Board of Directors of Sapelo Island Research Foundation, Inc.; SAPELO PLANTATION, INC., a Georgia corporation; STRATTON COYNER, individually and as Secretary of Sapelo Plantation, Inc.; THE BOARD OF DIRECTORS OF SAPELO ISLAND RESEARCH FOUNDATION, INC., a Georgia corporation; AMERICAN PROPERTIES, INC., a Georgia corporation; and THE STATE OF GEORGIA,
Appellees

CASE NO. 31642
CASE NO. 31676
(Consolidated)

APPELLANT'S MOTION FOR REHEARING

On November 3, 1976, the Supreme Court of Georgia affirmed the trial court's decisions in this case granting

motions for summary judgment filed by certain defendants.

Plaintiff/appellant respectfully moves for rehearing of said decision for the reasons stated below.

The Supreme Court, in rendering its decision, made essentially two findings which it deemed to be controlling: (1) That the agreement upon which plaintiff's claims are based, being a contract given in part for the consideration of her promise to marry Richard J. Reynolds at a time when he was married, was against the public policy of this State; and (2) that the common stock of Sapeloe Plantation, Inc. was never transferred on the stock books of the corporation. The Supreme Court held these facts were beyond dispute since they were deemed admitted in plaintiff's complaint.

This Court concluded that since the 1945 agreement was void as a matter of public policy, and since the stock was never transferred on the corporate books, plaintiff could not pursue her claims. Apparently this Court determined that the transfer of the stock on the corporate books of Sapeloe Plantation, Inc. was necessary to complete the transfer to plaintiff of stock ownership in that corporation. Thus, on the basis of this reasoning, the Supreme Court concluded that the 1945 agreement was executory. From that conclusion this Court, relying on Justice Atkinson's dissent in the case of *Guffin v. Kelley*, 191 Ga. 880, 891, 14 S.E.2d 50, determined that the plaintiff is unable to obtain equitable relief in this situation.

Plaintiff respectfully submits to this Court that it erroneously concluded that the transfer on the stock books of Sapeloe Plantation, Inc. of the stock transferred to appellant was necessary in order to complete the transaction which was the subject of the 1945 agreement.

In so concluding, the Court, we respectfully submit, overlooked material facts in the record and statutes and decisions controlling as authority and erroneously construed or misapplied provisions of law and controlling authority as hereinafter set forth.

Plaintiff agrees that her complaint states that the consideration for the 1945 agreement was in part her promise to marry Richard J. Reynolds, and that Richard J. Reynolds was married at the time of the agreement. However, it is plaintiff's contention, as supported by evidence in the record, that if the stock certificates were delivered to plaintiff by Richard J. Reynolds, full title to the stock was transferred to plaintiff and the 1945 agreement was no longer executory, but fully performed. At that point, Richard J. Reynolds was without the right or power to withdraw or undo the transaction without breaching plaintiff's rights. The Supreme Court apparently has concluded that because the stock was not transferred on the books of Sapeloe Plantation, Inc., plaintiff did not have full title to the certificates and thus is now seeking equitable relief to complete performance of the 1945 agreement. *This is not the situation.* The stock was fully transferred to, and title was vested in, plaintiff. Plaintiff is not asking the Court to compel any action to complete the transfer of the stock pursuant to the 1945 agreement, but is seeking relief because of defendants' fraudulent activities in causing the corporation (Sapeloe Plantation, Inc.) to transfer Sapelo Island to R. J. Reynolds and their subsequent fraudulent acts.

In the second paragraph on page one of this Court's opinion, the Court in describing the contract states that in the 1945 agreement Richard J. Reynolds agreed "to transfer the stock *upon the books* of Sapeloe Plantation, Inc. on or before sunset, October 20, 1945." The agreement in fact states that "said stock [is] to be *delivered* by sunset Saturday, October 20, 1945." (emphasis added)

The issue in this case essentially revolves around *delivery* of the stock certificates: if the stock certificates were delivered; the contract was executed and completed; and in that event the Court's ruling and Justice Atkinson's dissent in the case of *Guffin v. Kelley, supra* (extensively quoted by the Court) would not apply since this case would not be one in which a party is seeking equitable relief to enforce, or otherwise assist in, the transfer of assets pursuant to an illegal contract, *i.e.*, a contract to marry entered into by one who is at that time already married. If delivery of the stock was completed, plaintiff was the true and lawful owner thereof and no further action would be required to complete the 1945 agreement. Plaintiff would then be entitled to prosecute her claims for fraud against these defendants.

In support of her contentions, plaintiff calls the Court's attention to Section One of the Uniform Stock Transfer Act which was in effect in 1945 (former *Ga. Code* §22-19 et seq.). Under section one of that Act, it is provided that title to a certificate and the shares represented thereby could be *transferred by delivery of the endorsed certificate.* There was no requirement that the stock of a corporation be transferred on the books of the corporation in order to transfer valid title. In any stock transfer the certificates are merely endorsed on the reverse side, or a stock power and assignment is attached to the certificate, assigning the title thereto to complete the transaction. This is analogous to many other similar areas of the law, such as automobile title certificate transfers and assignments of promissory notes, contracts, checks, or other documents. With respect to each of such instruments, title thereto is transferred merely by signing the

reverse side of the document or attaching a separate assignment thereto and by delivery of the instrument. For example, it is not necessary in order to complete a transfer and sale of an automobile, to notify the Georgia Motor Vehicle Registration Department and have a new title certificate issued in the name of the transferee. As with stock certificates, the transfer is absolute once the title certificate to the automobile is assigned and delivered. If, in the instant case, delivery of the stock certificates occurred, title to the stock certificates was transferred absolutely from Richard J. Reynolds to Marianne O'Brien Reynolds. As between R. J. Reynolds and plaintiff, it was not necessary to notify the corporation. If the books of the corporation did not show plaintiff/appellant as the owner of the certificates when the dissolution occurred, then plaintiff/appellant would have been vulnerable to a bona fide purchaser who obtained the stock in Sapeloe Plantation, Inc. or its assets after dissolution in reliance upon the stock books of the corporation. However, there was no good faith purchaser involved here and there is no one today who has relied upon the stock records or the real estate records to their detriment without notice of plaintiff's claims.

The stock books of the corporation are merely a list of shareholders and are significant only in that the corporation is entitled to rely on those stock records in determining who is entitled to vote the shares of the corporation, to receive annual reports or other information distributed to shareholders, and to receive dividends and other matters. A corporation is not authorized or permitted to look behind the circumstances relating to the transfer of shares represented by assigned stock certificates. Thus, when an individual presents certificates to a corporation which have been assigned to him, the

corporation is bound to reissue those certificates indicating the shares are registered in that transferree's name. However, this does not increase or affect the ownership or title to the certificates, but merely puts the corporation on notice as to the name of the rightful owner. The Uniform Stock Transfer Act provision referred to above is controlling on this point (since it was in effect in 1945) and provides that delivery of the certificate itself, as opposed to any transfer on the corporate books, effects the transfer of title. No stock transactions are made contingent upon the transfer of the name of the owner of the stock on the books of the corporation and, indeed, the practice of the securities market is to effect transactions immediately upon the assignment of the stock certificates. There is no waiting period or provision for transfer upon the books of the corporation.

Plaintiff also respectfully suggests to this Court that its ruling effectively holding that transfer on the books of a corporation is necessary in order to effect deliver of stock certificates has consequences which reach far beyond the case immediately before the Court. By holding, as its opinion necessarily indicates, that stock certificates are not transferred by delivery with the appropriate endorsement thereon, the entire stock securities market industry, securities lawyers, and all securities dealers will have great cause for concern and will be vitally affected by the ruling. The Court's determination will mean that the traditional manner of handling securities transactions will no longer be followed. Stock sales and other stock transfer transactions will have to be altered in the future and will be conditional upon completing a transfer on the stock books of the corporation. This, of course, is unworkable. The stock market operates upon mere delivery of the certificates themselves, and to condition a trade until stock is transferred on

the stock books of the corporation will cause such unbelievable consequences as to be beyond reasonable comprehension. Stock transfer agents and corporate registrars effect the transfer of certificates on the corporate books many days after the receipt of certificates which have been endorsed to a purchaser or transferee and are not in position to immediately record the transaction. Thus we urge the Court to reconsider its opinion in light of these comments. The whole scheme of stock transfers, as set forth in the Uniform Commercial Code (*Ga. Code Ann.* §109A-8-101 et seq., and in particular *Ga. Code Ann.* §109A-8-301) provides that upon delivery of a certificate, the purchaser acquires the rights of the transferror and the security itself. The Court's opinion in this case requiring transfer on the books of the corporation is directly contrary to the statutory provisions in effect in 1945 at the time of the transfer of ownership to Marianne Reynolds (former *Ga. Code* §22-19), and it is directly contrary to the current law (*Ga. Code Ann.* § 109A-8-101, 301 et seq.). Both former and existing law require only the delivery of endorsed certificates to transfer ownership.

Plaintiff agrees that there is a factual issue concerning whether or not the stock was actually delivered, but plaintiff submits to this Court that it is not appropriate at this time to conclude as a matter of law that delivery of the stock certificates did not occur. The Supreme Court did not treat this issue in its opinion; but it merely indicated that, by reason of the fact that the stock was not transferred on the books of the corporation, the 1945 agreement was executory. As indicated, the transfer on the books of the corporation is not necessary to comply with the Uniform Stock Transfer Act.

Plaintiff does not state in her complaint that the stock certificates were not delivered, but only that R. J. Reyn-

olds misrepresented that he had caused the corporation to transfer the stock on its books when he had in fact not done so.

The only evidence of delivery, which material facts in the record were overlooked by the Court, indicates that the certificates were properly endorsed and delivered. [Deposition, Vol. I, pp. 45-46; Vol. II, p. 17] There is no evidence indicating that the stock was not delivered, and thus at a bare minimum there is a factual question as to this issue.

If it should be determined at trial that the certificates were never delivered, the 1945 agreement would be executory and the Supreme Court's opinion would apply to bar plaintiff's claims. However, if there was delivery, the Supreme Court's opinion would not be appropriate because the contract was not executory. As Judge Atkinson indicated in *Guffin v. Kelley, supra,* (and as quoted by this Court at page 5 of its decision in this case) "if a contract has been entered into through fraud or to accomplish any fraudulent purpose, a court of equity will not . . . *while the agreement is still executory,* either compel its execution or create its cancellation . . ." (emphasis added). Accordingly, this Court must necessarily have erroneously concluded that the contract was still executory.

In conclusion, plaintiff respectfully submits to this Court that it erroneously concluded that transfer on the stock books of Sapeloe Plantation, Inc. was necessary to complete delivery of the stock certificates. There was nothing in the 1945 agreement relating to a promise by R. J. Reynolds to *transfer* the stock on the books of the corporation, but he promised to *deliver* the certificates. All the evidence indicates that the certificates were de-

livered, but a determination of this issue is appropriate for trial. Thus, there is a genuine issue of fact which can only be answered and determined at trial.

For the above reasons, it was error to affirm Judge Harvey's grant of summary judgment and plaintiff respectfully requests reconsideration of this matter and the reversal of the trial court.

Respectfully submitted,

O'CALLAHAN, SAUNDERS & STUMM
A Professional Association

By /s/
John D. Saunders

/s/
Gene B. McClure

/s/
Richard L. Stumm

Suite 360, Prado North
5600 Roswell Road
Atlanta, Georgia 30342
(404) 252-2400

Attorneys for Plaintiff/Appellant

IN THE SUPREME COURT OF GEORGIA

MARIANNE O'BRIEN REYNOLDS,

Appellant

vs.

ESTATE OF RICHARD J. REYNOLDS, deceased; ANNEMARIE S. REYNOLDS, individually and as executrix of The Estate of Richard J. Reynolds, deceased; NANCY S. REYNOLDS, ED R. GRAY, JR., ALFRED W. JONES, SR., and HERRICK K. LIDSTONE, individually and as members of the Board of Directors of Sapelo Island Research Foundation, Inc.; SAPELO PLANTATION, INC., a Georgia corporation; STRATTON COYNER, individually and as Secretary of Sapelo Plantation, Inc.; THE BOARD OF DIRECTORS OF SAPELO ISLAND RESEARCH FOUNDATION, INC., a Georgia corporation; AMERICAN PROPERTIES, INC., a Georgia corporation; and THE STATE OF GEORGIA,

Appellees

CASE NO. 31642
CASE NO. 31676
(Consolidated)

CERTIFICATE OF COUNSEL

I, John D. Saunders, hereby certify that I am counsel to Appellant, Marianne O'Brien Reynolds; and that upon

careful examination of the opinion of this Court dated November 3, 1976, I believe that facts, statutes, or decisions have been overlooked, or the provisions of law or controlling authorities have been erroneously construed or misapplied.

Respectfully submitted,

/s/ JOHN D. SAUNDERS

O'Callaghan, Saunders & Stumm
A Professional Association
Suite 360, Prado North
5600 Roswell Road
Atlanta, Georgia 30342
(404) 252-2400

CERTIFICATE OF SERVICE

I hereby certify that I am counsel of record for the Plaintiff/Appellant, Marianne O'Brien Reynolds, in this matter; and that I have this day served the within and foregoing "Motion for Rehearing" upon the parties to this action by forwarding true copies of same to their respective counsel of record by first-class mail, postage prepaid, to the last address known for each said attorney:

John M. Tatum, Esq.
Miller, Beckmann & Simpson
P.O. Box 1567
Savannah, Georgia 31402

Daniel H. White, Esq.
Post Office Box 475
Darien, Georgia 31305

Patricia T. Barmeyer, Esq.
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Wallace E. Harrell, Esq.
Bennett, Gilbert, Gilbert, Whittle,
Harrell & Gayner
Post Office Box 190
Brunswick, Georgia 31402

Earle B. May, Jr., Esq.
Jones, Bird & Howell
4th Floor, Haas-Howell Building
Atlanta, Georgia 30303

This 12th day of November, 1976.

JOHN D. SAUNDERS
of Counsel

APPENDIX VII

GEORGIA STATUTES

1. Ga. Laws 1939, pp. 384-85, repealed and superceded, Ga. Laws 1962, p. 162, *et seq.* (former *Georgia Code Ann.* §22-1902), which is set out below:

UNIFORM STOCK TRANSFER ACT

An Act to define shares of stock and certificates of stock in corporations; to provide for and regulate the transfer of such shares and define the effect thereof; to regulate such transfers by executors and fiduciaries; to provide for the rescission of transfers, for the enforcement thereof, and to define the effect thereof; to define the effect of delivery of certificates; to define the rights of purchasers, mortgagees, pledgees and other holders of certificates as security for debt; to provide for the enforcement of executions and other writs against shares of stock; to define the effect of alteration of a certificate; to provide for endorsement of certificates and prescribe the effect thereof; to define bearer shares, bearer certificates and bearer warrants and provide for the transfer thereof; to provide for the issuance of new certificates in lieu of lost or destroyed certificates; to require that any claim or lien of a corporation upon shares issued by it shall be stated upon the certificate representing such shares, and for other purposes.

Be it enacted by the General Assembly of the State of Georgia and it is hereby enacted by authority of the same as follows:

Section 1. Title to a certificate and to the shares represented thereby can be transferred

only, (a) By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or (b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent, except that any lien or restriction stated in the face of the certificate shall not be affected.

2. Ga. Laws 1962, pp. 156, 364 (*Georgia Code Ann.* §109A-8-301), which is set out below:

(1) Upon delivery of a security the purchaser acquires the rights in the security which his transferor had or had actual authority to convey except that a purchaser who has himself been a party to any fraud or illegality affecting the security or who as a prior holder had notice of an adverse claim cannot improve his position by taking from a later bona fide purchaser. "Adverse claim" includes that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security.

(2) A bona fide purchaser in addition to acquiring the rights of a purchaser also acquires the security free of any adverse claim.

(3) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.